Bungsar Hill Holdings Sdn Bhd v Dr Amir Farid Datuk Isahak

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–03–72 OF 1996

MOHD SAARI, MOHD NOOR AHMAD AND RAHMAH HUSSAIN JJCA

7 JULY 2003

Bankruptcy *— Adjudication order — Annulment — Whether there was any sufficient ground for the court to annul the adjudication order and rescind the receiving order — Discretion of court — Bankruptcy Act 1967 s 105(1)*

This was an appeal against the reversed order of the senior assistant registrar in dismissing the respondent's (debtor) application for the setting aside of the receiving and adjudication order made against him on 27 June 1995. The debtor claimed that he was not aware of the bankruptcy notice and bankruptcy petition as the documents were served on him by way of substituted service. Thus, he was not aware of the hearing date and did not instruct solicitors to oppose the petition which led to the adjudication and receiving orders made against him. The bankruptcy action against the debtor was conducted during the period when efforts were being made to sell the partnership business pursuant to the settlement agreement. In the present case, the learned judge had relied solely on the first limb of s 105(1) of the Bankruptcy Act 1967, which is 'a debtor ought not to have been adjudged bankrupt' when he formed the opinion that at the time of the adjudication, the debtor was able to pay his debts. However, it was learned counsel's contention that the ability to pay was of no relevance unless payment was made towards satisfaction of the judgment debt and that, without such payment the debtor was still committing an act of bankruptcy, which gave the appellant the right to apply for both the adjudication and receiving orders. The issue to be determined was whether there was any sufficient ground for the court to annul the adjudication order and rescind the receiving order.

Held, dismissing the appeal and awarding costs to the respondent:

(1) The law is clear, in that the power of court to annul an adjudication order, is discretionary. Section 105(1) of the Bankruptcy Act 1967 provides, inter alia, two situations under which an annulment may be granted. The learned judge made it clear that he was exercising his discretionary power under the first limb of s 105(1) of the Bankruptcy Act 1967 (see p 5F–G).

(2) The debtor was only relying on 'some money tied up somewhere', but at the time the adjudication order was made on 27 June 1995, the petitioning creditor's debt was in existence and that an act of bankruptcy had been committed by the debtor. As such, the order was properly made. The position would have been different if at

the date the act of bankruptcy was committed the creditor's debt was *not* in existence in which case the adjudication and receiving orders were wrongly made and the court had no discretion to refuse to set aside such orders. Thus, in the circumstances of the present case, the Court of Appeal was satisfied that the learned judge was justified in interfering with the exercise of discretion by the senior assistant registrar (see pp 6D–E, 7E–F); *Sama Credit & Leasing Sdn Bhd v Pegawai Pemegang Harta, Malaysia* [1995] 1 MLJ 274 followed.

(3) By annulling the adjudication order on the ground that 'the debtor has money tied up somewhere', might open the floodgate where debtors who neglect to oppose a petition can later be freed from adjudication by resorting to s 105(1) of the Bankruptcy Act 1967 (see p 7F–G).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap perintah penolong kanan pendaftar yang telah menolak permohonan responden (penghutang) untuk mengenepikan perintah penerimaan dan penghakiman yang dibuat terhadap beliau pada 27 Jun 1995. Penghutang mendakwa bahawa beliau tidak mengetahui tentang notis kebankrapan dan petisyen kebankrapan tersebut kerana dokumen-dokumen tersebut telah disampaikan ke atas beliau melalui penyampaian gantian. Oleh itu, beliau tidak mengetahui tentang tarikh perbicaraan dan tidak mengarahkan peguamcara untuk membangkang petisyen tersebut yang menyebabkan perintah-perintah penghakiman dan penerimaan dibuat terhadap beliau. Tindakan kebankrapan terhadap penghutang dijalankan semasa usaha-usaha dibuat untuk menjual perkongsian perniagaan menurut perjanjian penyelesaian. Dalam kes semasa, hakim yang bijaksana telah bergantung semata-mata kepada cabang pertama kepada s 105(1) Akta Kebankrapan 1967, di mana 'a debtor ought not to have been adjudged bankrupt' apabila beliau membentuk pendapat bahawa pada masa penghakiman, penghutang mampu membayar hutang-hutang beliau. Namun begitu, ia adalah hujah peguam yang bijaksana bahawa kemampuan membayar tidak relevan kecuali jika pembayaran dibuat untuk menyelesaikan hutang penghakiman dan bahawa, tanpa pembayaran penghutang masih melakukan satu tindakan kebankrapan, yang memberikan perayu hak untuk memohon untuk kedua-dua perintah penghakiman dan penerimaan. Persoalan yang perlu ditentukan adalah sama ada terdapat alasan yang mencukupi untuk mahkamah membatalkan perintah penghakiman dan penerimaan tersebut.

Diputuskan, menolak rayuan tersebut dan mengawardkan kos kepada responden:

(1) Undang-undang adalah jelas, berhubung kuasa mahkamah untuk membatalkan satu perintah penghakiman, adalah mengikut budi

bicara. Seksyen 105(1) Akta Kebankrapan 1967 memperuntukkan, antara lain, dua keadaan di mana satu pembatalan boleh diberikan. Hakim yang bijaksana menyatakan dengan jelas bahawa beliau menggunakan kuasa budi bicara beliau di bawah cabang pertama kepada s 105(1) Akta Kebankrapan 1967 (lihat ms 5F–G).

(2) Penghutang hanya bergantung kepada 'some money tied up somewhere', tetapi pada masa perintah penghakiman dibuat pada 27 Jun 1995, terdapat hutang pemiutang penghakiman dan satu tindakan kebankrapan telah dilakukan oleh penghutang. Oleh itu, perintah tersebut telah dibuat dengan betul. Kedudukannya mungkin berbeza jika pada tarikh tindakan kebankrapan tersebut dilakukan, hutang pemiutang penghakiman tidak wujud lagi di mana dalam keadaan berikut perintah-perintah penghakiman dan penerimaan telah dibuat dengan salah dan mahkamah tiada budi bicara untuk mengenepikan perintah-perintah tersebut. Oleh itu, dalam keadaan-keadaan kes semasa, Mahkamah Rayuan berpuas hati bahawa hakim yang bijaksana mempunyai justifikasi untuk campur tangan dengan penggunaan budi bicara oleh penolong kanan pendaftar tersebut (lihat ms 6D–E, 7E–F); *Sama Credit & Leasing Sdn Bhd v Pegawai Pemegang Harta, Malaysia* [1995] 1 MLJ 274 diikut.

(3) Dengan membatalkan perintah penghakiman tersebut atas alasan bahawa 'the debtor has money tied up somewhere', akan membuka laluan di mana penghutang-penghutang yang enggan membangkang suatu petisyen boleh kemudiannya membebaskan diri daripada penghakiman dengan menggunakan s 105(1) Akta Kebankrapan 1967 (lihat ms 7F–G).]

Notes

For cases on the annulment of adjudication orders, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2010–2018.

Cases referred to

Hester, Re, ex parte Hester 22 QBD 632 (refd)

Kamaruddin bin Mohamed v United Motor Works (M) Sdn Bhd [1982] 1 MLJ 126 (refd)

Otway Ex parte, Re (1895) 1 QBD 812 (refd)

Sama Credit & Leasing Sdn Bhd v Pegawai Pemegang Harta, Malaysia [1995] 1 MLJ 274 (refd)

Ting Nguk Yong v Bank Utama (Malaysia) Bhd [1999] 1 AMR 1091 (refd)

Yap E Boon, Re [1933] 2 SSLR 217 (refd)

Legislation referred to

Bankruptcy Act 1883 [Eng] s 35
Bankruptcy Act 1967 ss 105(1), 6(3)

Appeal from: Bankruptcy No D2–29–1837 of 1993 (High Court, Kuala Lumpur)

Kamil Azman (*Skrine*) for the appellant.
Nor Hafsah bte Hamid (*Adam & Co*) for the respondent.

Rahmah Hussain JCA (delivering judgment of the court): In the court below, the learned judge of the High Court in Kuala Lumpur had reversed the order of the senior assistant registrar, who, on 10 June 1996, dismissed with costs the respondent's ('the debtor') application for the setting aside of the receiving and adjudication orders made against him on 27 June 1995. Hence, this appeal.

The facts of this case can be summarized as follows. The debtor is, and has been since 1985, a partner with two other doctors in a medical partnership carrying on business in the name of 'Poliklinik Kotaraya'. He has a 35% share in the partnership. In 1989, there arose between the three partners a dispute which gave rise in that year to three civil suits between them. On 13 March 1990, two interim receivers and managers of the partnership were appointed by the court pending final resolution of the dispute between the partners. By the said order also, the receivers were authorized to pay a monthly allowance of RM4,000 only to each of the partners.

Despite the dispute, the partnership continued to be a viable business enterprise and as at 30 December 1994, its net current assets amounted to RM2,047,442.12. The debtor had a share in the net profit for 1994 which amounted to RM660,433.52. On 26 February 1996, the receivers and managers confirmed that the amount of cash proceeds due to the debtor (after the partnership was sold under a settlement agreement entered into by the three partners on 10 November 1993) was in the region of RM400,000 after deducting all moneys owed by him to the partnership.

As regards the present appeal, it arose out of a suit in the sessions court brought by the petitioning creditor (appellant in this appeal) against the debtor, whereby it obtained judgment in the sum of RM32,095.41 with interest, plus RM2,033.50 for costs. Based on that judgment, the petitioning creditor (more than two years later) that is in 1993, commenced bankruptcy proceedings against the debtor without, it seems, resorting first to ordinary execution to recover the debt, which then stood at RM45,693.81.

The debtor claimed that he was not aware of the bankruptcy notice and bankruptcy petition as the documents were served on him by way of substituted service. As a result, he was not aware of the hearing date and did not instruct solicitors to oppose the petition. Finally, on 27 June 1995, adjudication and receiving orders were made against him.

A It is to be noted that the bankruptcy action against the debtor was conducted during the period when efforts were being made to sell the partnership business pursuant to the settlement agreement.

Before us, learned counsel for the appellant contended that since the debtor had committed an act of bankruptcy on 8 February 1994 and that B the procedure on bankruptcy proceedings was not contested, there was no ground for the court to annul the adjudication order and rescind the receiving order made on 27 June 1995. In support of his contention, he relied on the Federal Court case of *Kamaruddin bin Mohamed v United Motor Works (M) Sdn Bhd* [1982] 1 MLJ 126, wherein it was held:

C (2) in this case, the debtor had not complied with the bankruptcy notice and therefore there was an act of bankruptcy on which the petition could be grounded;

(5) in this case, the appellant had not paid his debts and the other grounds on which he relied were not proved to the satisfaction of the court and therefore there were no grounds to warrant an annulment of the D adjudication order.

He went on to say that in the present case, the learned judge had relied solely on the first limb of s 105(1) of the Bankruptcy Act 1967, which is 'a debtor *ought not to have been adjudged bankrupt*' when he formed the opinion that at the time of the adjudication, the debtor was able to pay his debts. E However, it was learned counsel's contention that the ability to pay was of no relevance unless payment was made towards satisfaction of the judgment debt and that, without such payment the debtor was still committing an act of bankruptcy, which gave the appellant the right to apply for both the adjudication and receiving orders.

F The law is clear, in that the power of court to annul an adjudication order, is discretionary. Section 105(1) of the Bankruptcy Act 1967 provides, inter alia, two situations under which an annulment may be granted:

(1) where in the opinion of the court the debtor ought not to have been G adjudged bankrupt, or

(2) where the debts are paid in full.

The learned judge made it clear that he was exercising his discretionary power under the first limb of s 105(1) of the Bankruptcy Act 1967, when he said: H

> On that premise, I came to the conclusion that the debtor *ought not to have been adjudged bankrupt* because, at the time that he was adjudged bankrupt, he was a person who was able to pay his debts, which is a ground under sub-s (3) of s 6 for refusing a petition.
>
> I was of the view that a debtor is able to pay his debts for the purposes of I sub-s (3) of s 6 if he is solvent, that is to say, he has enough assets to meet his liabilities. It does not mean that he has ready cash to settle his debts because that would be as good as requiring that he actually settles his debts to prove

> that he is able to pay his debts. But it must be borne in mind that when a petition is dismissed under sub-s (3) of s 6 on the ground that the debtor is able to pay his debts, he would not have actually paid his debts. (Emphasis added.)

Now sub-s (3) of s 6 of the Bankruptcy Act 1967 lays down several situations in which the court may dismiss a bankruptcy petition. It reads:

> If the court is not satisfied with the proof of the petitioning creditor's debt or of the act of bankruptcy or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition.

In the present case, the learned judge was of the view that on the facts existing at the date of the adjudication order, there was sufficient cause why no order ought to be made. He had this to say:

> The debtor was solvent. Adjudging him a bankrupt would restrict his freedom to act to obtain the key to open the safe where his money is locked up. If he was not adjudged bankrupt, the petitioning creditors could still, and with greater ease, get paid by ordinary execution. They would be able to garnish for their debt on the money belonging to the debtor in the hands of the receivers and managers.

However, the learned judge's view did not find favour with the appellant. According to counsel, the debtor was only relying on 'some money tied up somewhere', but at the time the adjudication order was made on 27 June 1995, the petitioning creditor's debt was in existence and that an act of bankruptcy had been committed by the debtor. As such, the order was properly made. He added, the position would have been different if at the date the act of bankruptcy was committed the creditor's debt was *not* in existence in which case the adjudication and receiving orders were wrongly made and the court has no discretion to refuse to set aside such orders (see *Re Yap E Boon* [1933] 2 SSLR 217).

The other case referred to by learned counsel *Ting Nguk Yong v Bank Utama (Malaysia) Bhd* [1999] 1 AMR 1091, is with respect, not applicable to our case as it relates to the second limb of s 105(1) of the Bankruptcy Act 1967. Therefore we shall not labour on that.

Learned counsel for the respondent (debtor) on the other hand relied heavily on the case of *Re Otway Ex parte* (1895) 1 QBD 812 (CA), where, she said, the facts are the same as in our case. In that case, a debtor had a life interest, which ceased on bankruptcy, in the income of certain property. He had no other property. He proposed to insure his life and to set aside half his income for the purpose of keeping up the insurance, and paying his creditors a composition of 10s in the pound. The petitioning creditor did not agree to this proposal, and a receiving order was made on his petition. On appeal, it was held that 'the fact that the effect of a receiving order would be to deprive the debtor of the only asset available for the payment of a composition to his creditors was a sufficient cause why no order should be made.

In his judgment, Lord Esher MR had this to say (at p 814):

> Now here the evidence is clear that if there is this bankruptcy the only asset out of which the bankrupt can pay any creditors, including the petitioning creditor, is an asset which by the bankruptcy is put an end to, and nothing is left. The case comes within s 7, sub-s 3, of the Bankruptcy Act 1883, which says that there are sufficient causes, besides those specially named in the section, for which the court may come to the conclusion that no order ought to be made, and that the petition should be dismissed.

Another case relied upon by learned counsel for the respondent is *Re Hester, ex parte Hester* 22 QBD 632 (CA) where the same words (as in our s 105(1) Bankruptcy Act 1967) in s 35 of the English Bankruptcy Act 1883 were considered. Cave J had this to say (at p 633):

> The language of s 35 is somewhat vague, and I think it was intentionally left vague, in order that the court may be able to do full and complete justice. I do not think it was intended that the application should be made on purely technical grounds, which might or might not have been successful at the time when the order was made, but that the words were meant to apply to larger objections — more equitable objections — such, for instance, as that the matter cannot be successfully worked out in bankruptcy, that the objects of the law of bankruptcy cannot be sufficiently attained by an adjudication, and that there are reasons why, in the interest of all the creditors, and without detriment to the public, the adjudication may be annulled. I think the section gives the court a very wide discretion.

In the Supreme Court case of *Sama Credit & Leasing Sdn Bhd v Pegawai Pemegang Harta, Malaysia* [1995] 1 MLJ 274, it was held that 'where the court of first instance has exercised its discretion, a strong case would be required to authorize or induce the appellate court to interfere'. Thus, in the circumstances of the present case, we are satisfied that the learned judge was justified in interfering with the exercise of discretion by the senior assistant registrar.

However, a final point which we feel deserves mention is learned counsel for the appellant's fear that by annulling the adjudication order on the ground that 'the debtor has money tied up somewhere', might open the floodgate, so to speak, where debtors who neglect to oppose a petition can later be freed from adjudication by resorting to s 105(1) of the Bankruptcy Act 1967 and using the abovesaid ground. To that, we say that we totally agree with what the learned judge had to say, which is:

> The answer to the fear is that the ground in s 105 that a debtor ought not to have been adjudged bankrupt can only avail a debtor in cases that are seen to be genuine and are deserving. Moreover, it is difficult to conceive of an actual case where a debtor would be so foolhardy as to deliberately take the risk of allowing himself to be adjudged bankrupt in the hope of later securing annulment of the adjudication through s 105.

In the circumstances, we dismissed the appeal and awarded costs to the respondent. We also ordered that the deposit be paid towards taxed costs.

Our decision was delivered on 20 March 2003 and in the meantime, one member of the panel, Mohd Saari JCA had since retired. The other

member of the panel, Mohd Noor Ahmad JCA has read this judgment in draft and has expressed his agreement with the same.

Appeal dismissed and costs awarded to the respondent.

Reported by Ezatul Zuria Azhari